Office - Supreme Court, U.S.
FILED
NOV 24 1982
ALEXANDER L. STEVAS,
CLERK

82-876

CASE NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

R. C. MARSHALL, Superintendent,
Southern Ohio Correctional Facility,
Petitioner,

v.

CRAIG FOWLER,
CHARLES JORDAN,
LARRY JOHNSON,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WILLIAM J. BROWN
Attorney General of Ohio

SIMON B. KARAS
Assistant Attorney General
Counsel of Record

State Office Tower
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
(614) 466-5414

ATTORNEYS FOR PETITIONERS

QUESTION PRESENTED

I. WHETHER A STATE TRIAL COURT HOLDING THAT "I FIND THE STATEMENTS WERE VOLUNTARILY GIVEN AND WERE NOT GIVEN BECAUSE OF THREATS, COERCION, AND ABUSE" IS SUFFICIENTLY PARTICULAR TO BE ACCORDED THE PRESUMPTION OF CORRECTNESS MANDATED BY PRINCIPLES OF FEDERAL–STATE COMITY AS CODIFIED IN 28 U.S.C. SECTION 2254(d) WHERE SUCH HOLDING WAS MADE AFTER A FULL AND FAIR EVIDENTIARY HEARING IN WHICH CONSIDERABLY DISPUTED TESTIMONY COULD ONLY BE RESOLVED ON THE BASIS OF A CREDIBILITY DETERMINATION; UNDER SUCH CIRCUMSTANCES MAY A FEDERAL APPEALS COURT REQUIRE A NEW FEDERAL EVIDENTIARY HEARING, EIGHT YEARS AFTER THE FACT, WHERE SUCH EVIDENTIARY HEARING WAS NOT ONLY NOT REQUESTED IN THE DISTRICT COURT BUT STIPULATED AS BEING UNNECESSARY.

PARTIES

The parties to this action are R. C. Marshall, Superintendent of the Southern Ohio Correctional Facility as successor custodian to A. R. Jago, the former Superintendent of that institution, and the respondents, Craig Fowler, Charles Jordan, and Larry Johnson.

TABLE OF CONTENTS

Page

QUESTION PRESENTED. i
PARTIES i
OPINIONS BELOW. 1
JURISDICTION 1
STATUTORY PROVISIONS INVOLVED 2
STATEMENT OF THE CASE. 4
ARGUMENT IN SUPPORT OF CERTIORARI 11
CONCLUSION 26
CERTIFICATE OF SERVICE. 27

TABLE OF AUTHORITIES

Cases:

Clark v. Jago,
676 F. 2d 1099 (6th Cir. 1972), *cert. pending* . . . 13
Fowler, et al. v. Jago,
683 F. 2d 983 (6th Cir. 1982). 1
Harless v. Anderson,
_____U.S._____ (1982) 11
Haynes v. Washington,
373 U.S. 503 (1963) 18
LaVallee v. Delle Rose,
410 U.S. 690 (1973) . . 12, 13, 14, 15, 17, 18, 19, 20
Lego v. Twomey,
404 U.S. 477 (1972) 18
Lonberger v. Jago,
635 F. 2d 1189 (6th Cir. 1980), *vacated and remanded,* _____U.S._____, 68 L. Ed. 2d 290 (1981), *opinion after remand,* 651 F. 2d 447 (6th Cir. 1981), *cert. granted sub nom Marshall v. Lonberger,* _____U.S. _____, 71 L. Ed. 2d 292 (1982) 13
Miranda v. Arizona,
384 U.S. 436 (1966) 18

TABLE OF AUTHORITIES, *(cont'd.)*

Page

Spano v. New York,
360 U.S. 315 (1959) 18
Sumner v. Mata, (I),
449 U.S. 539 (1981) 12, 13, 14, 21, 22
Sumner v. Mata, (II),
_____U.S._____, 71 L. Ed. 2d 480 (1982). 13
Townsend v. Sain,
372 U.S. 293 (1963) 15

Statutes:
28 U.S.C. Section 2254(d) 2, 11, 13, 18

OPINIONS BELOW

The decision of the United States Court of Appeals For The Sixth Circuit is reported as *Fowler, et al. v. Jago,* 683 F. 2d 983 (6th Cir. 1982). (A-1). The decision of the United States District Court For The Northern District Of Ohio, Eastern Divison is not reported. (A-32).

JURISDICTION

The decision of the United States Court Of Appeals For The Sixth Circuit was entered July 20, 1982. (A-1). A timely petition for rehearing and suggestion of rehearing en banc was denied October 7, 1982 (A-60). The decision of the United States District Court For The Northern District Of Ohio, Eastern Division was entered June 16, 1980 (A-32). Jurisdiction is conferred by 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. Section 2254(d)

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit:

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding,

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph

numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT OF THE CASE

Respondents, hereinafter, Fowler, Jordan, and Johnson, along with a fourth individual, Asa J. Harris, were charged by the April 1974 Term of the Cuyahoga County, Ohio Grand Jury with 33 separate offenses arising from a spree of incidents occurring on May 29, 1974. At trial, the state established that on the evening of May 29, 1974, Andrew "Schoolboy" Jackson was watching television at Judy Winegardner's house at 13615 Fourth Street, East Cleveland, Ohio. Present in the house were several minor children. Judy Winegardner and Andrew Jackson, Jr. (12) had left the house to go to the store.

At about 9:30 p.m., several men broke into the house and at gunpoint forced all the people in the house to lie face down on the floor.[1] The instruders then proceeded to rob Andrew Jackson of his rings and money and took televisions, a stereo record player and speakers and other items from the house, which were loaded in two cars — one belonging to Andrew Jackson and the other to Fowler.

While the burglary was occurring, Judy Wingardner and Andrew Jackson, Jr. returned from the store. They

---

1. Several victims identified a man named Boshoen as one of the men. Boshoen was later identified as Asa J. Harris. Harris' defense at trial was alibi. Only Fowler, Jordan and Johnson were arrested that night, Harris later being arrested in Cincinnati, Ohio.

were then forced into the house with the other people and Judy Winegardner was robbed of two diamond rings. The intruders then tied up all the victims except a 16-month old baby and Andrew Jackson who was forced to accompany them.

The gunmen took Jackson to his house at 13736 Euclid Avenue, East Cleveland, Ohio. In the house were several other individuals. The gunmen forced their way into the house, kicking in the back door. They then forced the victims to lay on the floor and burglarized the house of money, jewelry, guns, a T.V. set, and other items belonging to Andrew Jackson. During this time, Joyce Cray, who lived on the third floor of the house, telephoned police who responded to the area. Being notified of police presence, the gunmen started to leave, again taking Jackson with them. Jackson was able to break free however and ran to the police, the men fleeing through the backyards of various houses on blocks bordered by Wellesley and Mt. Union. Police on the scene went into Jackson's house, untied the people there, observed that the telephones had been ripped out and found a carbine rifle on the kitchen table.

Police then began an extensive search of the Wellesley–Mt. Union area, eventually coming to the O'Brien house. At that time, the gunmen who had broken in, ordered Michael O'Brien to tell the police that the men they were looking for had been there but left. At that time, various members of the O'Brien family were on the second and third floors of the house. One of the gunmen was on a landing between the first and second floor, watching the front door. The other gunmen were on the second floor.

The police noticed that Michael O'Brien was extremely nervous and asked if they could search the

house. Just as a couple of the officers entered the vestibule of the house, Michael O'Brien informed the police the men were inside. The police officers turned to run off the porch and simultaneously a rapid burst of rifle fire came from the house at the police on the porch. As the police were diving for cover, a Cleveland police car containing Officers Spahr and Beranek drove up to the front of the O'Brien house. At that time, bursts of rifle fire hit them, wounding both.

A gun battle lasting for about an hour then ensued, Cleveland police reinforcing the units from East Cleveland. During such battle, various other officers received wounds. After various doses of tear gas, the gunmen eventually left the house, allowing most of the O'Briens to leave by the front door and taking some of them with them out the back. During the confusion of the subsequent arrests, two of the O'Briens were shot and wounded. Following arrest, Fowler, Jordan and Johnson each made admissions that they broke into the O'Brien house and had earlier broken into Jackson's house to rob him.

Fowler, Jordan and Johnson related an entirely different sequence of events than that shown by the state's witnesses and their own admissions. They testified that "Schoolboy" Jackson was a known drug pusher who they were attempting to convert to their Sunni Muslim faith, and thus stop drug traffic in the East Cleveland area. After several prior confrontations, Jackson, on May 29, 1974, indicated that he had been thinking about what they had told him and wanted them to come to his house for further discussions. Contrary to the testimony of the state's witnesses who were tied up when found by police, Fowler, Jordan and Johnson stated that when they arrived, Jackson was alone. A discussion followed in which Jackson appeared to be agreeing to their religion and he voluntarily flushed some drugs down the toilet.

Jackson then said he had some guns that he wanted to get rid of to purge himself and they all proceeded to his house where, after 15 or 20 minutes upstairs by himself, Jackson gave them the guns. As they were preparing to leave, Jackson pushed Fowler and started running towards police who began firing. Fowler, Jordan and Johnson alleged at trial that this was a set-up by Jackson with the aid of police who he allegedly was paying off to conduct his narcotics business.

Fearing for their lives, Fowler, Jordan and Johnson fled, arriving at the O'Brien house where they sought refuge. Thereafter, as the police entered the home, the police fired, and they returned it to protect themselves, as they believed the police were trying to kill them. At trial, Fowler, Jordan and Johnson attacked the voluntariness of their admissions and the accuracy of such admissions as relayed or recorded by the police. They also theorized that various of the officers had been shot by other police in a cross-fire.

After careful consideration of all the evidence produced in this month-long trial, the jury returned its verdict finding Fowler, Jordan, and Johnson each guilty of the aggravated burglary of Andrew Jackson, the aggravated robbery of Andrew Jackson, the aggravated burglary of Judy Winegardner, the aggravated burglary of Catherine O'Brien, and the attempted aggravated murders of Ptl. William Beranek and Sgt. Richard Spahr. Various counts resulted in verdicts of not guilty and on various counts the jury failed to return a verdict and the trial court dismissed such charges. Asa J. Harris was acquitted on all charges.

As a result of the above convictions, Fowler, Jordan, and Johnson were each sentenced to terms in the Ohio penal system totalling 15-100 years.[2] Subsequent to

---

2. Johnson's total sentence is 17-140 years, the sentence in issue herein being consecutive to two prior convictions for which he was on parole.

conviction, Fowler, Jordan and Johnson each appealed to the Court of Appeals of Cuyahoga County, Ohio raising numerous allegations of error including the voluntariness of his statements. On December 11, 1975, however, the Court of Appeals affirmed in all respects. (A-62). A subsequent appeal to the Ohio Supreme Court raising the identical issues was denied on May 13, 1976. (A-71).

On January 12, 1979, Fowler, Jordan, and Johnson, each filed a petition for writ of habeas corpus relief with the United States District Court For The Northern District Of Ohio, Eastern Division and the petitions were consolidated. As pertinent, the petitions alleged:

> The state trial court violated petitioner's fifth and fourteenth amendment rights by admitting into evidence statements purportedly made by petitioner while in police custody, which were extracted by deception and physical and mental coercion.

(Not reproduced in appendix). A return of writ admitting exhaustion of state remedies, but contesting the merits of each of the several claims was duly filed and the lengthy transcript of the state court trial was submitted as an exhibit.[3]

Following interim pleadings, the district court, on June 16, 1980, issued its opinion and judgment denying the writ of habeas corpus. (A-32). With respect to the voluntariness of Fowler, Jordan, and Johnson's statements, the district court held:

---

3. Due to the length of the transcript, 8000 pages, it was not required to be physically filed with the district court, but was kept by the Clerk of Court of Cuyahoga County for safekeeping and subsequent loan basis to the district court. The transcript however is part of the record of this case.

> Whether petitioners in this case were subjected to verbal and physical abuse and whether their confessions were the product of any such abuse, are factual issues that were fully and fairly litigated in the trial court at a hearing in which petitioners were represented by counsel. Therefore under 28 U.S.C. Section 2254(d), the finding of the state court that petitioners' confessions were not the product of abuse or coercion is presumed to be correct unless that "factual determination is not supported by the record".
>
> As stated above, there was conflicting testimony about whether petitioners were subjected to physical and verbal abuse. Resolution of this issue was largely a matter of credibility. After hearing the testimony of the witnesses and looking at photographs taken of the petitioners on the night of their arrest, the court found that petitioners' confessions were not coerced. This Court, having considered as a whole that part of the record pertinent to the issue of coercion, finds the state court's determination is fairly supported by the record.

(A-38).[4] A motion to alter and amend judgment was denied on July 10, 1980. (A-59).

---

4. Of significant importance is that Fowler, Jordan, and Johnson not only did not request an evidentiary hearing, but stipulated that none was necessary:

> The Petitioners and Respondent are in agreement that no evidentiary hearing is necessary in this case to review the claims currently presented to the Court.

(A-74).

Upon appeal, the United States Court Of Appeals For The Sixth Circuit, by 2-1 vote, reversed and remanded for a new evidentiary hearing. (A-1). In essence, the majority held that the state trial judge did not make a sufficiently particularized holding entitled to a presumption of correctness since it could not determine whether the state trial court utilized the correct application of constitutional law nor found the facts reliably:

> This Court cannot evaluate the appropriateness of the state court's conclusion because the state trial judge has given no indication that he applied the appropriate legal standard. The factual disputes in this case are so frequent and so dramatic that they call for specific credibility resolution by a judge.

(A-15). Judge Engel wrote a lengthy dissent, the substance of which is capsulized:

> In my opinion, a proper respect for the teachings of *LaVallee v. Delle Rose,* 410 U.S. 690 (1973), and *Townsend v. Sain,* and for the Congressional mandate of 28 U.S.C. Section 2254 justifiably require us to uphold the decision of the district court denying habeas relief.

(A-21). A petition for rehearing and suggestion of rehearing en banc was denied on October 7, 1982 (A-60) and a stay of the mandate was issued October 26, 1982. (A-61). This petition has followed.

ARGUMENT IN SUPPORT OF CERTIORARI

I

WHETHER A STATE TRIAL COURT HOLDING THAT "I FIND THE STATEMENTS WERE VOLUNTARILY GIVEN AND WERE NOT GIVEN BECAUSE OF THREATS, COERCION, AND ABUSE" IS SUFFICIENTLY PARTICULAR TO BE ACCORDED THE PRESUMPTION OF CORRECTNESS MANDATED BY PRINCIPLES OF FEDERAL–STATE COMITY AS CODIFIED IN 28 U.S.C. SECTION 2254(d) WHERE SUCH HOLDING WAS MADE AFTER A FULL AND FAIR EVIDENTIARY HEARING IN WHICH CONSIDERABLY DISPUTED TESTIMONY COULD ONLY BE RESOLVED ON THE BASIS OF A CREDIBILITY DETERMINATION; UNDER SUCH CIRCUMSTANCES MAY A FEDERAL APPEALS COURT REQUIRE A NEW FEDERAL EVIDENTIARY HEARING, EIGHT YEARS AFTER THE FACT, WHERE SUCH EVIDENTIARY HEARING WAS NOT ONLY NOT REQUESTED IN THE DISTRICT COURT BUT STIPULATED AS BEING UNNECESSARY.

Petitioner is well aware of recent pronouncements of this Court that the writ of certiorari is not a vehicle for the correction of every erroneous decision issued by a lower court and must be utilized carefully in the interests of docket control. *Harless v. Anderson,* _____U.S._____ (1982). Given those parameters however, this case remains a proper case for certiorari review. This is not simply another case in which a disaffected litigant seeks

one more chance. Rather it is a case in which the decision of the Court below is in direct conflict with applicable decisions by this Court. *Sumner v. Mata,* (I), 449 U.S. 539 (1981); *LaVallee v. Delle Rose,* 410 U.S. 690 (1973). Certiorari serves an important goal in such situation by securing uniformity of decision by the lower courts. It serves the interest of docket control by limiting and confining the lower courts to the proper exercise of their jurisdiction.

Moreover, the case is one of national importance as a representative example of the unfortunate tendency in recent years of the lower courts not honoring the direction and precedent by this Court as to the proper relationships of the federal and state judiciary. In *Sumner v. Mata,* (I) *supra,* this Court clearly set forth the policy considerations of comity, minimization of friction, and finality justifying a presumption of correctness of state court factual findings which is essential to a properly working federal system. Judge Engel in dissent in this case summarized such holding:

> Congress carefully provided in 28 U.S.C. Section 2254(d) for a presumption of correctness of factual findings made after a hearing by a state court of competent jurisdiction. Section 2254(d) commands that these factual findings "shall" be presumed correct unless any one of eight specific circumstances should exist. Clearly, the statute admonishes federal courts to be respectful of the integrity of their sister courts in the states and of the coequal ability of state courts to protect the constitutional rights of persons accused of crime.

(A-22). Despite such pronouncement, this Court has been called upon to secure compliance with its own decision. *Sumner v. Mata,* (II), _____U.S._____, 71 L. Ed. 2d 480 (1982); *Lonberger v. Jago,* 635 F. 2d 1189 (6th Cir. 1980), *vacated and remanded,* _____U.S._____, 68 L. Ed. 2d 290 (1981), *opinion after remand,* 651 F. 2d 447 (6th Cir. 1981), *cert. granted sub nom Marshall v. Lonberger,* _____U.S._____, 71 L. Ed. 2d 292 (1982).[5] This case again calls on this Court to enforce the supremacy of its own decisions. The principles of comity, minimization of friction, and finality have all been violated by the appellate court's first instance undermining of eight year old convictions rendered after a month long trial by a jury of respondents' peers.

Finally, unlike other *Sumner* cases before this Court, this case involves a novel, unanswered and important twist to the problem of when a state court finding should be accorded the presumption of correctness – the interplay between *LaVallee v. Delle Rose, surpa* and *Sumner, surpa.* The Court of Appeals herein did not directly confront the state court finding of fact and hold that it was not supported by the evidence. 28 U.S.C. Section 2254(d)(8). Rather, relying on 28 U.S.C. Section 2254(d)(1), the appellate court created an end run around *Sumner* and simply held that the state court finding was not a finding subject to the *Sumner* presumption.

> The state judge's findings in the instant case cannot meet these exacting standards. The findings are conclusory and do not give assurance that the trier of fact applied the correct standards of law.

---

5. See also: *Clark v. Jago,* 676 F. 2d 1099 (6th Cir. 1982), *cert. pending.*

(A-14). In the context of this case, such a holding portends that few, if any, state court findings will survive scrutiny. This Court's decisions in *Sumner* and *LaVallee* portend just the opposite.

The trial court in this case held a 4½ day evidentiary hearing on the admissibility of Fowler's oral and written statement, Jordan's oral statement and Johnson's oral and written statement. Each respondent was represented by competent counsel and numerous witnesses were called. At the conclusion of the hearing, the trial court held that all statements, except Fowler's written statement which was suppressed, would be admitted into evidence. With respect to specific allegations of physical and mental coercion, the trial court ruled:

> I find the statements were voluntarily given and were not given because of threats, coercion, and abuse.

(Tr. 662) (A-76). The appellate court now holds that the trial court did not adequately resolve the merits of respondents' factual assertions. Such holding constitutes mere substitution of judgment.

The appellate court went astray in its initial premise. The Court found the above holding not sufficiently particular to withstand scrutiny because semantically it concluded one could not ascertain whether the trial court found no coercion or abuse and thus the statements were voluntary or whether the trial court found coercion and abuse, but applied the wrong standard of law. (A-15). In answer to this contention, *LaVallee* is answer enough.

In *LaVallee,* this Court was faced with a similar situation. Therein, after an evidentiary hearing, the state court simply ruled, ". . . I find and decide that the

respective confessions to the police and district attorney were, in all respects, voluntary and legally admissible at the trial." *LaVallee, supra* at 691. In response to an argument that such finding was not sufficiently particular to be accorded the presumption, this Court relied on language in *Townsend v. Sain,* 372 U.S. 293 (1963)[6] to hold that when a trial judge refuses to exclude a confession in the face of allegations of "third degree" methods of interrogation, the district judge may assume that the state court reliably found the material facts. *LaVallee, supra* at 694. Such assumption should be applied to the more particularized finding in this case.

As indicated in the statement of facts, the evidence at the hearing on the motion to suppress was in considerable dispute and turned ultimately on the credibility of the witnesses. Fowler, Jordan, and Johnson each testified to a series of physical and mental coercions starting with their arrests and terminating with the giving of their statements. Fowler testified that he was placed on the ground, cuffed, kicked several times, choked, and burned with a cigarette on his leg. Then he was beaten with a black jack and ultimately placed in a room where officer Bayerl moved between he and Jordan hitting each in the face with the butt of his shotgun which eventually broke. In interrogation, racial epithets were used, he was threatened with physical harm, his family was threatened, and he was denied an attorney and medical care. Jordan similarly testified that he was made to lie spread eagled on the ground, that he was struck several times with a rifle, that he was continually denied an attorney, and was subjected to custodial interrogation which included denial of his rights and verbal and physical abuse. Finally,

---

6. "Thus if third degree methods of obtaining a confession are alleged and the state court refused to exclude the confession from evidence, the district judge may assume that the state trier found the facts against the petitioner, the law being, of course, that third degree methods necessarily produce a coerced confession." *Townsend, supra* at 315.

Johnson alleged that while on the ground after being arrested, he was beaten and his hand stepped on. He was then dragged to the police car wherein a woman police officer hit him in the face with a flashlight and another officer beat him with a black jack. Then as he was being taken into the police station his head was rammed into a steel door. At the police station, he was threatened with physical injury, denied counsel, and told if he didn't give a statement the Dectective squad would be turned loose on his family. Johnson alleged specifically that he was told if he didn't give a statement he would lose his eye, which was cut, and for which he ultimately got medical treatment.

The police officers' testimony was substantially different and included a complete denial of any mental or physical coercion. The officers testified that any injuries that occurred to respondents occurred as a result of resisting arrest. As an example, Fowler was knocked to the ground as he proceeded out of the O'Brien house with several of the hostages in front of him. Similarly, Johnson was pushed into the door of the police station as he was attempting to break away. Officer Bayerl specifically denied that he hit Fowler or Jordan with a shotgun, and similar denials were evoked with respect to Johnson being hit with a flashlight. The police officers denied any threats to respondents' families, and substantially disputed every facet of the interrogation process. The extent of the police denial as to physical or mental abuse is specifically catalogued in Judge Engel's dissent. (A-27). More importantly, with respect to request for counsel, testimony was elicited that each respondent had been given their rights, had not requested counsel, and gave accurate statements which were signed and initialed by them.[7] Finally, there was substantial

---

7. Fowler did request a counsel in connection with giving a written statement and police attempted to call one for him. The trial court suppressed this written statement for that reason, but did not suppress his prior oral statement.

testimony by the police officers disputing not only how respondents suffered any injuries, but the extent of such injuries as well. Given the conflicting testimony, the following conclusion of Judge Engel is inherently correct:

> I believe that the state trial judge was fully entitled to discredit not only their testimony concerning the night's events altogether, but also was entitled to discount the petitioners' description of the causes and extent of their alleged injuries and any impact those events might have had on the voluntariness of their statements. Obviously that is exactly what he did.

(A-27).

Notwithstanding that the determination to be made turned solely on credibility, the appellate court concluded that the state trial judge may have utilized the wrong standard. Pursuant to *LaVallee,* however, the trial court's finding must be read in the common sense manner in which it was intended and not the strained semantic gloss placed on it by the appellate court. The state trial judge was experienced, fair and competent. Even the attorneys pressing the motion to suppress never doubted his ability to know and apply the correct constitutional standards:

> This being the evidence in the case, I won't burden the Court. The Court heard the evidence, and I am sure the Court is aware of the various case laws in the area.

(Tr. 626). (Not reproduced in appendix). Moreover, respondents never questioned that the trial court had

made a sufficiently particularized finding until the question was raised as an appellate afterthought. In the district court, respondents specifically indicated that no evidentiary hearing was necessary. (A-74). They never asserted that no finding was made, that the finding was not specific, or that the Court applied the wrong law. Rather they simply asserted, contrary to 28 U.S.C. Section 2254(d), that from the cold record the district court should make its own credibility determinations. It was only on appeal and after the district court had found the finding supported by the record, that they attacked the finding itself. This resulted in the anomolous result that the appellate court remanded for an evidentiary hearing that respondents had told the district court was unnecessary. (A-74). Finally, the construction by the appellate court gives no credence to the competency or integrity of the state trial judge (or the state reviewing courts). The law on coerced confessions is well settled. *Lego v. Twomey,* 404 U.S. 477 (1972); *Haynes v. Washington,* 373 U.S. 503 (1963); *Spano v. New York,* 360 U.S. 315 (1959). If the trial court had found the coercion and abuse alleged by respondents in this case, it "can scarcely be doubted" that relief would not have been granted:

> Under these circumstances, we think the District Court could have been reasonably certain that the state court would have granted relief if it had believed respondents' allegations.

LaVallee, supra at 695.[8]

---

8. Indeed rulings by the state trial judge with respect to *Miranda* and counsel claims give further indication that respondents' voluntariness allegations were disbelieved and the trial judge was well aware of prevailing constitutional law. Immediately following the ruling on voluntariness, the trial judge denied the further allegations that the statements should be suppressed for failure to abide by *Miranda v. Arizona,* 384 U.S. 436 (1966). The trial court suppressed one statement holding:

In response to the assertion that *LaVallee* controlled this case, the appellate court found it distinguishable on the basis that the factual disputes herein were "too complex":

> The need for such a hearing is compelled by the failure of the state trial judge to articulate the legal standard applied in making the determination of voluntariness, or the factual findings upon which it was based in light of the complex facts of this case.

(A-15). But a requirement that the state trier of fact issue a "finding of fact and conclusion of law" as to each credibility determination is exactly the approach rejected by this Court in *LaVallee:*

> The only question is, whether a lawyer was requested prior to any statement.
>
> I find that Defendant Fowler asked to see a lawyer before making a written statement. This being the case, his written statement will be suppressed.
>
> I find Defendant Jordan waived his right to a lawyer, that he did not request a lawyer prior to making his statement and therefore, his statement is admissible.
>
> I find the oral statement of Defendant Johnson to be admissible, since he requested to see a lawyer only before making a written statement, and no such statement was ever made.
>
> Thus, for Defendant Fowler, the oral statement can be used. The written statement cannot be.
>
> For the Defendant Johnson, his written statement can be used, and for the Defendant Jordan, his oral statement can be used.

(Tr. 662-663) (A-76). As noted by the district court, the trial court transposed the first references to Jordan and Johnson. (A-40). The fact remains that the trial court could not have reached the above conclusions unless he disbelieved the testimony with respect to request for counsel.

> Although it is true that the state trial court did not specifically articulate its credibility findings, it can scarcely be doubted from its written opinion that respondent's factual contentions were resolved against him.

LaVallee, supra at 692. The appellate court simply adopts the dissenting position in *LaVallee.* (A-9).

Moreover, petitioner disputes the contention of the appellate court that this case was "too complex" to be controlled by *LaVallee.* The only complexity to the credibility determinations is that unlike *LaVallee,* three individuals instead of one alleged physical and mental coercion. Even under the dissent's view in *LaVallee,* the relatively simple determination of whether to believe the allegations should be accorded the presumption:

> To be sure, where for instance, a defendant alleges simply that a confession was extracted from him by means of a physical beating administered by the police, it is obvious that if the defendant's story is believed, the confession would be involuntary. Thus even if a state court holds the defendant's confession to be voluntary *without articulating any reason,* a federal district court may safely assume that in such an uncomplicated situation, the state Court's determinations resulted from a rejection of the defendant's factual allegations.

(emphasis added) *LaVallee, supra* at 698-699, Marshall dissent. The trial court's holding herein is hardly "without articulating any reason".

Finally, the complexity of the case as perceived by the appellate court is of its own making. Petitioner highly disputes the appellate court's contention that there are unexplained inconsistencies in the record of this case which cast material doubt on whether the trial court adequately found the facts. Rather, the appellate court both mischaracterizes the record and fails to follow the clear substantive and procedural admonitons by this court in *Sumner* to explain why it does not credit the characterizations of primary historical fact by the state judiciary.

The most prominent example is the treatment the appellate court gives to respondents' contention that newspaper photos taken at the scene of the arrest when compared to police photographs taken later at the police station establish that some injury occurred in the interim. The appellate court's characterization is as follows:

> There is clear evidence from photographs that defendants Fowler and Johnson suffered injuries between approximately 1:00 a.m., at the time of their arrest, and 4:00 to 5:00 a.m., when photographs were made.

(A-4). Yet the state court of appeals reviewing the same record stated:

> The photographs of the appellants, do not demonstrate they had been beaten as the injuries were minor and insignificant.

(A-66). The appellate court never states why it does not credit this finding. While stating it had no view on the merits, the appellate court does state:

> A comparison of pictures taken of Fowler at the time of his arrest with identification photos at the station indicate that Fowler's face sustained some type of blow. These pictures and the testimony of Officer Copeland remain entirely unexplained.
>
> Or, did it conclude that no coercion was used against petitioners? If it reached the latter conclusion, the finding would be clearly erroneous, for there is clear evidence on the record indicating that force and coercion were used against petitioners, particularly with reference to Fowler.

(A-14, 15). Yet the appellate court never explains how it makes such statements in light of the testimony of police officers that Fowler was not abused, that any injuries sustained were the product of Fowler's own resistance and any injuries were far less than claimed by Fowler. The appellate court's whole compliance with *Sumner* is to state:

> We believe that the long reiteration of the questions raised by the testimony at the state court hearing fulfills this obligation.

(A-16). The final anomoly of this case is that the appellate court's lengthy opinion is far less clear as to why it rejected the state court finding than the trial court's relatively succint finding was in rejecting respondents' claims. From the majority opinion itself, there is evidence to support Judge Engle's comment:

> I respectfully suggest that what is characterized by the majority as uncertainty

> regarding the legal standard employed in the state court is simply an honest disagreement with the conclusions which the state trial judge so clearly reached respecting voluntariness. This is not and should not be, in our constitutional system of joint federal-state responsibility, a valid basis for the interposition of the differing views of federal judges.

(A-25).

One final example is necessary to establish the liberty that the appellate court took with the record in this case. The appellate court states that:

> He [Officer Copeland] admitted that the police probably hit the petitioner.

(A-6). From this, the appellate court constructs that there had to be coercion:

> For example, Officer Copeland conceded that Fowler had probably been struck. He also conceded that Fowler's face showed evidence of some trauma. . . .These pictures and *the testimony of Officer Copeland* remain entirely unexplained.

(A-14). (emphasis added) Yet the testimony of Officer Copeland is not supportive of this thesis. Officer Copeland testified:

> (Mr. Wuliger)
>
> Q. Now, other than observing sweating on Charles Jordan, you weren't able to discern any other physical infirmities that he was suffering from at that time?

(Officer Copeland)

A. Well, I will explain it to you at this time so that you will understand.

The male got arrested. If they got hit—Fowler—which may have been a cut on his lip—I don't know.

But I can't sit here and say that they weren't, or that they were. Now, if they got hit by a police officer, I don't know who that police officer was. So we may as well clear that up now.

They probably did get hit.

Q. All right. They probably got beat, didn't they.

(Mr. Marino)

Objection

A. They didn't get beat, counsel.

A. . . .

There was nothing done to him by the officer that interviewed him in the room at the police station. Now what was done to him by the arresting officer, out there on Mount Union, I don't know.

So I would appreciate it if you quit asking me, because I don't know.

> Now, the man might have been bruised up from coming out of the house where police officers were shot and civilians were shot.
>
> But he was interviewed at the police station and he told us what happened. We asked him why did they do it. He told us - that was the same way it was with Mr. Fowler, Mr. Fowler just wanted it to be that he would tell his whole story in the statement as to why he did this.
>
> He wanted to get that in his statement, and that was in his statement, so he decided to make that. But nobody was harmed in the police station.
>
> The men were caught coming out of the house. He just wanted to tell us why they did this, and that was it.

(Tr. 35, 46-47). (Not reproduced in appendix). The appellate court's "concession by Officer Copeland" based on his gratuitious remark is simply factually unfounded. The record supports that respondents were subject - not to police coercion - but to professional police officers who performed their duty under the Constitution despite the chain of events precipitated by respondents.

Petitioners understand the seriousness of the allegations presented by the respondents with respect to the traditional voluntariness of their confessions. The State

of Ohio, no less than the appellate court below, condemns involuntary confessions and tactics long hoped forever banished. The supposition however, that eight years after the fact, a federal court can hold a "better factfinding" is a slender reed upon which to reopen a full and fair state court determination.

Judge Engel said it best:

> These petitioners have had their day in court. They have been accorded due process in those proceedings and have been found guilty after a fair trial. This litigation should be at rest.

(A-31). This Court should grant certiorari and reverse.

CONCLUSION

Wherefore, for the above reasons, the petition for writ of certiorari should be granted and the decision of the Circuit Court should be reversed.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General of Ohio

SIMON B. KARAS
Counsel of Record
Assistant Attorney General

State Office Tower
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
(614) 466-5414

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been forwarded to respondents, Craig Fowler, Charles Jordan, and Larry Johnson, through the office of their counsel, Richard L. Aynes, Appellate Review Office, College of Law, The University of Akron, Akron, Ohio 44325, via the U.S. Mail, this _____day of November, 1982. I further certify that all persons required to be served have been so served. Respondents' addresses are each Southern Ohio Correctional Facility, P. O. Box 45699, Lucasville, Ohio 45699.

SIMON B. KARAS
Counsel of Record